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assist the court. Whatever a court may know or do on its own initiative an *amicus curiae* may suggest, and it is usually immaterial who prompts him to appear.

STANDARDS IN INTERNATIONAL LAW. — As Dean Pound has clearly demonstrated, the desirability of rules, capable of strictly logical application, or standards, varying in application with changes in circumstances, depends upon the interests to be protected.¹ When the law is protecting interests of substance, upholding the social interest in the security of transactions and acquisitions, the utmost certainty is necessary. Fixed rules are required, upon which the business world can rely, and in that way avoid disputes and expensive litigation.² Such are the Rule in Shelley's Case in the Law of Property and the rules of negotiability in the Law of Negotiable Instruments. But when the law is protecting interests of personality, defining the limits of legal conduct, the rights of individuals outweigh the need for reliable rules. The infinitely varied combinations of facts call for the infusion of a discretionary element into the legal requirements of the situation. For this purpose the law employs standards,³ which in prescribing the limits of legal conduct allow a certain margin of attainment within the bounds of reason. Such are the standards of due care in the law of torts,⁴ of reasonable service and reasonable facilities in the law of public utilities,⁵ of fiduciary duty in equity.⁶ These standards "formulate the general expectation of society as to how individuals will act in the course of their undertakings . . . devised to guide the triers of fact in applying to each unique set of circumstances their common sense, resulting from their experience."⁷ Action which is due, reasonable, appropriate to the

¹ See Roscoe Pound, "Juristic Science and Law," 31 HARV. L. REV. 1047, 1060-1063; Roscoe Pound, "The Administrative Application of Legal Standards," 44 REP. AM. BAR ASSN., 445.

² See Roscoe Pound, "The Administrative Application of Legal Standards," *supra*, 454, 455; J. H. Beale, Jr., "What Law Governs the Validity of a Contract?" 23 HARV. L. REV. 260, 264.

³ See Roscoe Pound, "Juristic Science and Law," *supra*, 1061; Roscoe Pound, "The Administrative Application of Legal Standards," *supra*, 456, 457.

⁴ See *Yerkes v. N. P. R. Co.*, 112 Wis. 184, 193, 88 N. W. 33, 36 (1901).

⁵ See *Atlantic Coast Line Co. v. Wharton*, 207 U. S. 328, 335 (1907); *Loomis v. Lehigh Valley R. Co.*, 208 N. Y. 312, 322, 323, 101 N. E. 907, 911 (1913); *Chicago, R. I. & P. R. Co. v. Lawton Refining Co.*, 253 Fed. 705, 707 (1918). See 1 WYMAN, PUBLIC SERVICE CORPORATIONS, § 797.

⁶ See *Robinson v. Roinstead*, 180 N. W. (S. D.) 67, 68 (1920) (administrator); *Magruder v. Drury*, 235 U. S. 106, 119, 120 (1914) (trustee); *Lurie v. Pinanski*, 215 Mass. 229, 231, 102 N. E. 629, 634 (1913) (partner); *Essex Trust Co. v. Enright*, 214 Mass. 507, 510, 511, 102 N. E. 441, 442 (1913) (employee); *Rolikatis v. Lovett*, 213 Mass. 545, 548, 100 N. E. 748, 749 (1913) (attorney); *Rogers v. Genung*, 76 N. J. E. 306, 312, 316, 74 Atl. 473, 475, 477 (1909) (broker).

Compare the duty of a trustee investing funds to use such care as would a reasonably prudent family man, investing with a view to protecting absolutely dependent people. See *Rae v. Meek*, 14 A. C. 558, 569, 570 (1889); *Hart's Estate* (No. 1), 203 Pa. 480, 485, 486, 53 Atl. 364, 366 (1902); *Winder v. Nock*, 104 Va. 759, 763, 52 S. E. 561, 563 (1906). See LORING, A TRUSTEE'S HANDBOOK, 1 ed., 69-82.

⁷ See Roscoe Pound, "The Administrative Application of Legal Standards," *supra*, 457.

circumstances, is called for and necessarily, therefore, a variation in circumstances requires a variation in application.⁸

In the field of international law the protection of national interests of substance on the one hand and of personality on the other calls for the application of the same guiding principles in their recognition and delimitation. Questions of the rights of nations over adjoining bodies of water, of what are territorial waters,⁹ of immunity of government owned property from judicial interference,¹⁰ of international regulations of commerce, open a large field for the logical application of fixed rules in the interests of certainty, while the conduct of a nation in the society of nations raises much the same problem as the conduct of an individual in society in general. It can best be regulated with a view to some degree of individualization and consideration of circumstances, by means of standards, as, for example, the standard of reasonable action of civilized nations in the circumstances.

A recent New York case¹¹ is significant in this connection in declaring that the question of the abrogation of treaties by war is to be determined by a standard rather than by rules. The respect accorded to a treaty involves an interest similar to an interest of personality. The expressed will of the sovereign will control in his own courts,¹² but in the absence of any revelation of his intent the courts may properly im-

⁸ But rules are constantly invading the proper sphere of standards and subjecting them to specification. See HOLMES, *THE COMMON LAW*, 110-119; Roscoe Pound, "The Administrative Application of Legal Standards," *supra*, 456. And certain specifications may prove efficacious, witness the rules of the road. But the danger lies in attempting to apply to a generality of situations with differing circumstances a rule which is an appropriate application of the standard only to the particular circumstances of special situations.

Thus in Pennsylvania a fixed rule developed that a failure to "stop, look, and listen" at a railroad crossing was negligence *per se*, irrespective of attending circumstances. See *Pa. R. Co. v. Beale*, 73 Pa. St. 504, 509, 510 (1873); *Davidson v. L. S. & M. C. R. Co.*, 171 Pa. St. 522, 524, 33 Atl. 86, 87 (1895); *Sullivan v. N. Y. R. Co.*, 175 Pa. St. 361, 365, 34 Atl. 708, 709 (1896). For criticisms of the Pennsylvania "Stop, Look, and Listen" doctrine: see *C. N. O. & T. P. R. Co. v. Ferra*, 66 Fed. 496, 501 (1895); *Chicago & N. W. R. Co. v. Hansen*, 166 Ill. 623, 627, 628, 46 N. E. 1071, 1072, 1073 (1897). See 6 ALBANY L. J. 313, 314; KEENER, *QUASI-CONTRACTS*, 103-108.

We also find in the books subdivisions of the standard of due care into slight, ordinary, and extraordinary care. See *Tracy v. Wood*, 3 Mason (U. S. C. C.), 132 (1822); *Astin v. Chicago, M., & St. P. R. Co.*, 143 Wis. 477, 483, 484, 128 N. W. 265, 268 (1910); *W. U. Tel. Co. v. Reeves*, 34 Okla. 468, 473, 126 Pac. 216, 218 (1912) (statutory); *Robinson v. Troy Laundry*, 180 N. W. (Neb.) 43, 45 (1920) (statutory). For criticism of the "Degrees of Negligence" doctrine, see *Gardner v. Boston R. Co.*, 204 Mass. 213, 216, 90 N. E. 534, 535 (1910); *Cates v. Hill*, 171 N. C. 360, 363, 88 S. E. 524, 525, 526 (1916).

⁹ See 1 WESTLAKE, *INTERNATIONAL LAW*, 2 ed., c. 9; HALL, *INTERNATIONAL LAW*, 5 ed., 152 *et seq.*; 1 HALLACK, *INTERNATIONAL LAW*, 3 ed., § 13; BYNKERSHOEK, *DE DOMINIO MARIS*.

¹⁰ For the American doctrine, see: *The Siren*, 7 Wall. (U. S.) 152 (1868); *The Davis*, 10 Wall. (U. S.) 15 (1869); *Stanley v. Schwalby*, 147 U. S. 508, 512, 515 (1893); *Johnson Lighterage Co.*, No. 24, 231 Fed. 365 (1916); *The Maipo*, 252 Fed. 627 (1918). Cf. *The Charkieh*, L. R. 4 Adm. & Ecc. 59, 99, 100 (1873); *The Parlement Belge*, L. R., 5 P. D. 197 (1878). *Mighell v. Sultan of Johore* [1894] 1 Q. B. 149.

¹¹ *Techt v. Hughes*, 229 N. Y. 222, 128 N. E. 185 (1920). See RECENT CASES, p. 789, *infra*.

¹² Cases showing the refusal of the judiciary to review the determination of political questions by the legislative and executive departments of the government: *Foster v.*

pose an external standard in determining what action the nation will be presumed to have taken in the circumstances.¹³

The old writers upon international law declared that a declaration of war abrogated all pre-existing treaties, and then excepted treaties intended to regulate the conduct of hostilities.¹⁴ The exceptions in time became the rule and later writers were content to enumerate the individual kinds of treaties and state the effect of war upon each.¹⁵ Thus we find statements that political treaties, such as treaties of alliance, which are not intended to set up a permanent condition of things, are abrogated;¹⁶ while treaties intended to establish a permanent state of affairs, as cession, boundary, and recognition treaties, are unaffected by war.¹⁷

Judge Cardozo seeks the common element which pervades these precepts and sets up the standard that treaties are abrogated in the circumstance of war only in so far as and to the extent that "their execution is incompatible with war."¹⁸ The clause of the treaty in issue, between the United States and Austria, gave reciprocal rights of inheritance to the subjects of each country in the lands of the other.¹⁹ It was upheld as subsisting because to do so seemed "most in keeping with the traditions of the law, the policy of the statute, the dictates of fair dealing, and the honor of the nation." On principle, this standard, recognizing the duty of sovereign nations to live up to their contracts and excusing performance only where it is impossible, seems eminently sound and

Neilson, 2 Pet. (U. S.) 253 (1829); *Williams v. Suffolk Ins. Co.*, 13 Pet. (U. S.) 415 (1839); *Phillips v. Payne*, 92 U. S. 130, 132 (1875); *Jones v. United States*, 137 U. S. 202 (1890); *Pearcy v. Stranahan*, 205 U. S. 257 (1907).

See in this connection two discussions of the respective functions of the President and Congress in the termination of treaties. Jesse S. Reeves, "The Jones Act and the Denunciation of the Treaties," 15 AM. J. OF INTERNATIONAL LAW, 33; Howard T. Kingsbury, "The Refusal of the President to Give Notice of the Termination of Certain Treaty Provisions under the Jones Act," 15 AM. J. OF INTERNATIONAL LAW, 39.

¹³ Of course, it must be admitted that the court might have approached the problem as purely a matter of presuming the actual intent of the sovereign, in the absence of any expression thereof. See *Jones v. Walker*, 2 Paine (U. S. C. C.), 688, 696. If such were the line of approach, as might be inferred from parts of the opinion, it is arguable that it would not furnish an example of the application of a standard at all, but merely of a rule of construction. But it seems fair to say that the court is seeking to apply an external standard of the reasonable action of a civilized nation with respect to its treaty obligations in the circumstance of war. For the effectiveness of such standards, as well as of rules of international law in general, see Ronald F. Roxburgh, "The Sanction of International Law," 14 AM. J. OF INTERNATIONAL LAW, 26.

¹⁴ See 3 PHILLIMORE, INTERNATIONAL LAW, 3 ed. 794; VATTEL, THE LAW OF NATIONS, Chitty's ed., 371.

¹⁵ See LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW, 4 ed., § 146; 2 OPPENHEIM, INTERNATIONAL LAW, 2 ed., § 99; 1 HALLECK, INTERNATIONAL LAW, 3 ed., 294; CRANDALL, TREATIES, 2 ed., § 181; HALL, OUTLINE OF INTERNATIONAL LAW, § 73; 2 WESTLAKE, INTERNATIONAL LAW, 2 ed., 33, 34; 1 KENT, COMMENTARIES, 12 ed., 176, 177.

¹⁶ See note 15, *supra*.

¹⁷ See note 15, *supra*. See also *Society v. Newhaven*, 8 Wheat. (U. S.) 464, 494, 495 (1823); *Sutton v. Sutton*, 1 R. & M. 663, 675 (1830).

¹⁸ See KENT, *supra*, 176; SCOTT, RESOLUTIONS OF INSTITUTE OF INTERNATIONAL LAW, 172; BLUNTSCHI, LE DROIT INTERNATIONAL CODIFIÉ, 5 ed., § 538.

¹⁹ See 9 STAT. AT L. 944.

should gain a large following in the courts the world over. The liberality of such opinions as that of Judge Cardozo, must open the way to the ultimate effectiveness of international law.

EFFECT OF THE STATUTE OF LIMITATIONS UPON A GRANTOR'S¹ EXPRESS LIEN FOR THE PURCHASE PRICE. — It is customary in some states for the grantor of land to reserve in the deed a lien for the unpaid purchase price. A recent decision refuses, at the suit of a purchaser from a grantee, to remove the cloud on title caused by such a lien, after the Statute of Limitations had run upon the purchase debt.² The problem is twofold: First, is the lien enforceable after extinguishment of the debt? Secondly, even if it is not, will equity clear the title of one who purchased with knowledge of the debt? The authorities are divided on the first of these questions.³ It is clear at the outset that no analogy can be drawn from doctrines of the "title" theory of mortgages.⁴ For a vital factor in the case under discussion is that the creditor does not have legal title. A more profitable analogy is furnished by the lien which in some jurisdictions, in the absence of express agreement, is given an unpaid vendor.⁵ It is true that this implied lien has often been attacked on the ground that it violates the Statute of Frauds and is opposed to the policy of the recording acts;⁶ but those objections are obviated in the case of the express lien which appears directly in the chain of title.⁷ It is overwhelmingly held that the former depends for its very life on the debt it was created to secure.⁸ The express lien, which

¹ Since the term "vendor's lien" has become current in cases where legal title is retained for security, it seems advisable to restrict its use to that situation.

² *Wilson v. Davis*, 86 So. 686 (Fla.) (1920). For the facts of this case see RECENT CASES, p. 793, *infra*.

³ In accord with the principal case: *Hull's Administrator v. Hull's Heirs*, 35 W. Va. 155, 13 S. E. 49 (1891). *Contra*, *Chase v. Cartright*, 53 Ark. 358, 14 S. W. 90 (1890). The federal courts follow the state law. *Dupree v. Mansur*, 214 U. S. 161 (1909).

⁴ It is well settled that the mortgagee can foreclose after the debt is barred, in the title-theory states. *Thayer v. Mann*, 19 Pick. (Mass.) 535 (1837); *Menzel v. Hinton*, 132 N. C. 660, 44 S. E. 385 (1903); *Eyer mann v. Piron*, 151 Mo. 107, 52 S. W. 229 (1899). *Contra*, *Harding v. Durand*, 138 Ill. 515, 28 N. E. 948 (1891). See 2 JONES, MORTGAGES, 7 ed., §§ 1204, 1207. The same is true in the similar situation where the vendor retains legal title for security. *Hardin v. Boyd*, 113 U. S. 756 (1885); *McGehee v. Blackwell*, 28 Ark. 27 (1872). Since express reservation of a lien is in Texas considered as preventing title from passing, the cases there are governed by this rule. *Ellis v. Hannay*, 64 S. W. 684 (Tex. Civ. App.) (1901); *Woodward v. Ross*, 153 S. W. 158 (Tex. Civ. App.) (1913).

⁵ *Mackreth v. Symmons*, 15 Ves. *329 (1808); *Crampton v. Prince*, 83 Ala. 246, 3 So. 519 (1888); see 1 PERRY, TRUSTS, 5 ed., § 232.

⁶ *Ahrend v. Odionne*, 118 Mass. 261 (1875); *Philbrook v. Delano*, 29 Me. 410 (1849). See 2 WARVELLE, VENDORS, 2 ed., § 679.

⁷ All the statutes abolishing implied liens exempt express liens. See, for instance, 2 POLLARD, 1904 VIRGINIA CODE, § 2474; 1862 VERMONT GENERAL STATUTES, c. 65, § 33.

⁸ *Borst v. Corey*, 15 N. Y. 505 (1857); *Ilett v. Collins*, 103 Ill. 74 (1882); *Benedict v. Griffith*, 92 Ark. 195, 122 S. W. 479 (1909); *Shaylor v. Cloud*, 63 Fla. 608, 57 So. 666 (1912). *Contra*, *Baltimore & Ohio R. R. Co. v. Trimble*, 51 Md. 99 (1878). This is now true in England. See 19 HALSBURY, LAWS OF ENGLAND, 14.